

days after receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the administrative law judge shall make his or her decision. The decision of the administrative law judge shall include findings of fact and conclusions of law with reasons therefor upon each material issue of fact or law presented on the record. The decision of the administrative law judge shall be based upon the whole record. In a contested case in which the Department and the Respondent have presented their positions to the administrative law judge pursuant to the procedures for 502(c)(2) civil penalty proceedings as set forth in this subpart, the penalty (if any) which may be included in the decision of the administrative law judge shall be limited to the penalty expressly provided for in section 502(c)(2) of ERISA. It shall be supported by reliable and probative evidence. The decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704 unless an appeal is made pursuant to the procedures set forth in §§ 2570.69 through 2570.71.

§ 2570.69 Review by the Secretary.

(a) The Secretary may review a decision of an administrative law judge. Such a review may occur only when a party files a notice of appeal from a decision of an administrative law judge within twenty (20) days of the issuance of such decision. In all other cases, the decision of the administrative law judge shall become final agency action within the meaning of 5 U.S.C. 704.

(b) A notice of appeal to the Secretary shall state with specificity the issue(s) in the decision of the administrative law judge on which the party is seeking review. Such notice of appeal must be served on all parties of record.

(c) Upon receipt of a notice of appeal, the Secretary shall request the Chief Administrative Law Judge to submit to him or her a copy of the entire record before the administrative law judge.

§ 2570.70 Scope of review.

The review of the Secretary shall not be *de novo* proceeding but rather a review of the record established before the administrative law judge. There

shall be no opportunity for oral argument.

§ 2570.71 Procedures for review by the Secretary.

(a) Upon receipt of the notice of appeal, the Secretary shall establish a briefing schedule which shall be served on all parties of record. Upon motion of one or more of the parties, the Secretary may, in his or her discretion, permit the submission of reply briefs.

(b) The Secretary shall issue a decision as promptly as possible after receipt of the briefs of the parties. The Secretary may affirm, modify, or set aside, in whole or in part, the decision on appeal and shall issue a statement of reasons and bases for the action(s) taken. Such decision by the Secretary shall be final agency action within the meaning of 5 U.S.C. 704.

Subpart D—Procedure for the Assessment of Civil Penalties Under ERISA Section 502(l)

SOURCE: 55 FR 25286, June 20, 1990, unless otherwise noted.

§ 2570.80 Scope of rules.

The rules of practice set forth in this subpart are applicable to “502(l) civil penalty proceedings” (as defined in § 2570.82 of this subpart) under section 502(l) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act). Refer to 29 CFR 2560.502-1 for the definition of the relevant terms of ERISA section 502(l).

§ 2570.81 In general.

Section 502(l) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, part 4 of title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the “applicable recovery amount” paid pursuant to any settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary

§ 2570.82

under section 502 (a)(2) or (a)(5). The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty if the Secretary determines in writing that:

(a) The fiduciary or other person acted reasonably and in good faith, or

(b) It is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan or any participant or beneficiary of such plan without severe financial hardship unless such waiver or reduction is granted.

The penalty imposed on a fiduciary or other person with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under section 502(i) or section 4975 of the Internal Revenue Code of 1986 (the Code).

§ 2570.82 Definitions.

For purposes of this section:

(a) *502(l) civil penalty proceedings* means an adjudicatory proceeding relating to the assessment of a civil penalty provided in section 502(l) of ERISA;

(b) *Notice of assessment* means any document, however designated, issued by the Secretary which contains a specified assessment, in monetary terms, of a civil penalty under ERISA section 502(l). A "notice of assessment" will contain a brief factual description of the violation for which the assessment is being made, the identity of the person being assessed, and the amount of the assessment and the basis for assessing that particular person that particular penalty amount;

(c) *Person* includes an individual, partnership, corporation, employee benefit plan, association, exchange or other entity or organization;

(d) *Petition* means a written request, made by a person, for a waiver or reduction of the civil penalty described herein; and

(e) *Secretary* means the Secretary of Labor and includes, pursuant to any delegation of authority by the Secretary, the Assistant Secretary for Pension and Welfare Benefits, Area Directors for Pension and Welfare Benefits, or Deputy Area Directors for Pension and Welfare Benefits.

29 CFR Ch. XXV (7-1-01 Edition)

§ 2570.83 Assessment of civil penalty.

(a) Except as described in §§2570.85 and 2570.86 of this part, subsequent to the payment of the applicable recovery amount pursuant to either a settlement agreement or a court order, the Secretary shall serve on the person liable for making such payment a notice of assessment of civil penalty equal to 20 percent of the applicable recovery amount.

(b) Service of such notice shall be made either:

(1) By delivering a copy to the person being assessed; if the person is an individual, to the individual; if the person is a partnership, to any partner; if the person is a corporation, association, exchange, or other entity or organization, to any officer of such entity; if the person is an employee benefit plan, to a trustee of such plan; or to any attorney representing any such person;

(2) By leaving a copy at the principal office, place of business, or residence of such individual, partner, officer, trustee, or attorney; or

(3) By mailing a copy to the last known address of such individual, partner, officer, trustee, or attorney.

If service is accomplished by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by the addressee.

§ 2570.84 Payment of civil penalty.

(a) The civil penalty must be paid within 60 days of service of the notice of assessment.

(b) At any time prior to the expiration of the payment period for the assessed penalty, any person who has committed, or knowingly participated in, a breach or violation, or has been alleged by the Secretary to have so committed or participated, may submit a written request for a conference with the Secretary to discuss the calculation of the assessed penalty. A person will be entitled under this section to one such conference per assessment. If such written request is submitted during the 60 day payment period described in subparagraph (a), such a request will not toll the running of that payment period.

(c) The notice of assessment will become a final order (within the meaning